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Supreme Court of the United States

OCTOBER TERM, 1956

No. 186

DANIEL A. BOLICH, *Petitioner,*

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The majority and dissenting opinions in the Court of Appeals are reported in *United States* v. *Grunewald, Bolich, and Halperin,* 233 F. 2d 556.

On petitions for rehearing or to stay the issuance of the mandate and to continue bail, the petitions for stay of mandate and continuance of bail as to each of the above named appellants were granted, but the petitions for rehearing were denied by a divided Court, Judge Frank dissenting in an opinion, reported in 233 F. 2d 556, at pp. 592-598, as to the petitions for rehearing and voting for reversal and ordering a new trial for all the defendants.

The opinions referred are printed in Vol. V Appendix as follows: the original majority opinion is printed at pp. 288a-316a; the original dissenting opinion of Judge Frank, at pp. 316a-357a; and the further dissenting opinion of Judge Frank on the denial of the petitions for rehearing at pp. 380a-393a.

Jurisdiction

The judgment of affirmance by the Court of Appeals (except as to the fine of $5,000 imposed on petitioner Bolich) was entered on April 10, 1956 (Vol. V App., p. 358a). A timely application for rehearing was made by petitioner on April 24, 1956 and was denied on June 1, 1956, Judge Frank dissenting from the denial thereof and voting to reverse the conviction of all the defendants and to grant them a new trial (Vol. V App., p. 394a). The petition for certiorari on behalf of Bolich was filed on June 21, 1956. Grunewald and Halperin also filed separate petitions for certiorari. This Court granted limited certiorari to all the petitioners on October 15, 1956 (R. 984-988). The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

Statutes Involved

18 U.S.C. § 371. *Conspiracy to commit offense or to defraud United States*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both." • • •

26 U.S.C. § 4047 (e) (4).

§ 4047 (e). *Other unlawful acts of revenue officers or agents*

"Every officer or agent appointed and acting under the authority of any revenue law of the United States — • • •

"(4) Who conspires or colludes with any other person to defraud the United States; • • • shall be dismissed from office, shall be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than three years. • • •."

Questions Presented

The order granting certiorari limited the questions as to the petitioner Bolich to those enumerated below (R. 984, 987):

No. 186

"1. Whether the three year Statute of Limitations, applicable to the charge of conspiracy, barred conviction of the petitioner Bolich inasmuch as the objective of the alleged conspiracy had been achieved by January, 1949—more than five years before the date of the indictment which was filed on October 25, 1954.

2. Whether multiple conspiracies were established by the evidence, rather than a single general conspiracy, to the substantial prejudice of the rights of the petitioner Bolich.

6. Whether the trial Court committed prejudicial error in permitting the government to elicit from the defendant Halperin upon his cross-examination that he had invoked the Fifth Amendment at a Grand Jury hearing and the trial Court charged the jury that they might consider Halperin's claim of constitutional privilege as adversely affecting his credibility."

Statement of the Case

The petitioner Bolich was convicted of the crime of conspiracy (Title 18, U.S.C. § 371 and 26 U.S.C. § 4047 (e) (4) after a trial in the United States District Court for the Southern District of New York (R. 782-783)).

Bolich was found guilty together with two co-defendants Henry W. Grunewald and Max Halperin, who were each convicted of conspiracy under 18 U.S.C. § 371 (R. 2-4). Halperin was also convicted on other counts (R. 3-4).

Bolich was sentenced to imprisonment for five years and fined $10,000 on Count 1, and three years imprisonment and fined $5,000 on Count 2, such prison sentences to run concurrently (R. 782-783).

When the case was first before the United States Court of Appeals, that Court rendered a decision unanimously affirming the judgments of conviction as to Bolich and Grunewald (Vol. V App. 288a-316a), except as to the separate fine of $5,000 imposed on Bolich on Count 2 which was set aside, the Court below holding that both Counts 1 and 2 related to the same conspiracy (Vol. V App. 307a-309a; 316a; 358a). Frank, Circuit Judge, dissented solely as to the co-defendant Halperin (Vol. V App. 316a-357a).

On petitions for rehearing filed by Bolich, Grunewald and Halperin, Judge Frank dissented from the denial thereof and rendered an opinion in which he voted to reverse and grant a new trial as to all the defendants (Vol. V App. 380a-393a).

The Indictment

On October 25, 1954, an indictment was returned in which the petitioner, Daniel A. Bolich, former Assistant Commissioner of Internal Revenue, was named as defendant together with seven others—Henry W. Grunewald, Max Steinberg, Harry T. Scherm, Max Halperin, Milton Hoff-

man, Irving Davis and Samuel Schopick (R. 4-16). Upon the Government's motion, a severance of the trial was granted as to the defendants Hoffman, Davis and Schopick (R. 1).

The indictment contained seven counts (R. 4-16).

The First Count on which all three petitioners were convicted, alleged that beginning on or about January 1, 1946, and continuing up to and including the date of the filing of the indictment (October 25, 1954), all defendants, together with others named as co-conspirators but not indicted, conspired in violation of the general conspiracy statute, to defraud the United States in the administration of the revenue laws and to influence witnesses before the Grand Jury in the Eastern District of New York, and before a Congressional Investigating Committee and charged that defendants and co-conspirators would make continuing efforts to avoid detection and prosecution through the use of any means whatsoever and generally obstructing justice (R. 4-8).

It is also alleged that during the course of the conspiracy, Bolich was a Special Agent in Charge of the Intelligence Unit of the Bureau of Internal Revenue in New York City, and Assistant Commissioner of Internal Revenue (R. 5).

In Paragraph 8 it is charged that the defendants and co-conspirators Davis, Hoffman and Schopick would represent that the latter named three individuals and the law firm of Schopick & Davis were specialists in income tax matters and that they had connections and influence enabling them to obtain for taxpayers favorable disposition of tax matters regardless of merits (R. 6-7).

The remaining paragraphs 9 to 14 inclusive alleged that the defendants, Steinberg and Scherm (who were acquitted), would use their positions as employees of the Internal Revenue Bureau to impress upon various persons that the law firm of Schopick & Davis had connec-

tions and could procure favorable disposition of tax matters within the Bureau, regardless of merits (R. 6-7); that the defendants and co-conspirators Davis, Hoffman and Schopick would obtain sums of money to procure corrupt dispositions of then pending tax matters (R. 7); that defendants Bolich, Steinberg and Scherm, as officers and employees of the Bureau, would corruptly render decisions and corruptly handle pending matters (R. 7); and that the defendants and co-conspirators at all times would misrepresent and conceal their acts and purposes of said conspiracy by any means whatsoever and whenever and wherever it was sought by any governmental body to detect and prove the existence of the conspiracy (R. 7-8).

Thirteen overt acts are alleged to have been committed in pursuance of the conspiracy (R. 8-9). Insofar as petitioner Bolich is concerned, the overt act specified is:

> "8. On or about December 20, 1951, within the Southern District of New York, the exact place to the Grand Jury unknown, defendant DANIEL A. BOLICH had a telephone conversation with one Everett Harding" (R. 9).

The first overt act is alleged to have taken place on October 29, 1948, and the last which is numbered 13, is alleged to have occurred on April 7, 1954 (R. 8-9). It is to be noted that the trial judge in charging the jury (R. 738), withdrew from their consideration three overt acts,—those numbered 10, 12 and 13, because there was no evidence of such overt acts which were alleged to have taken place on March 12, 1952, August 26, 1952 and April 7, 1954, respectively.

The Second Count of the indictment charged Bolich, Steinberg and Scherm, as employees of the Internal Revenue Bureau, with conspiracy in violation of 26 U.S.C. 4047 (e) (4) (R. 9-12). The conspiracy alleged is precisely the same as charged in the First Count (R. 4-9). Growing out of the same transaction alleged in the First Count, the

Second Count covers exactly the same period of time involved in the First Count. Defendants Steinberg and Scherm were acquitted (R. 1, 781). As has already been stated, Bolich was also convicted on Count 2. The Court below, holding that both Counts 1 and 2 related to the same conspiracy, set aside the separate fine of $5,000 imposed on Bolich on Count 2 (Vol. V App. 307a-309a; 358a).

The Third Count was dismissed by the trial judge at the close of the government's case upon the ground that prosecution thereof was barred by the Statute of Limitations (R. 569).

The Fourth Count was dismissed before trial (R. 569).

The Fifth, Sixth and Seventh Counts (R. 14-16) were dismissed as against the defendants Grunewald, Bolich, Steinberg and Scherm at the close of the government's case (R. 569).

The Facts Material to the Questions Presented

The record of this joint trial is voluminous extending over 5,400 pages. At the commencement of the trial, the government called eleven witnesses whose testimony taken "subject to connection" is spread over 1,925 pages in four volumes of the trial record (pp. 141-2066). None of these witnesses mentioned the petitioner Bolich, except Louis Berman and Monroe Tobias, who testified to hearsay statements allegedly made to them by Davis concerning the Gotham Beef case to which further reference will be made (R. 141).

The evidence upon which the government relied to establish the offenses charged in the indictment against the defendants was as to each of the defendants different and in a large measure wholly disconnected. The government's case against the petitioner Bolich is based entirely upon circumstantial evidence.

The background of the case—with its mazes and ramifications—are set forth in the brief of the petitioner Grunewald and need not be repeated here. Accordingly to avoid any duplication, we respectfully request that such recital may be deemed incorporated herein, inasmuch as the questions presented by each petitioner, in the main, raise substantially the same issues although framed in a different manner.

The government proceeded upon the theory that the alleged conspiracy involved the corrupt and illegal disposition of two separate tax cases, namely *Pattullo Modes, Inc.*, a dress manufacturing company, and *Gotham Beef Co.*, a meat firm, which were under investigation in 1948 by the Internal Revenue Department (R. 81-83, 309-313, 574-577). Both companies were clients of the law firm of Schopick & Davis (R. 300, 314-318) who were named as defendants in the indictment, together with Milton Hoffman, not a lawyer, but employed by these attorneys as a business "steerer", sharing 47% of their professional income (R. 200, 257-258).

The Gotham Beef Case

The Gotham Beef case was one of the cases which had been assigned for review in April, 1948, to Herman F. Kuehl employed by the Internal Revenue Service, Intelligence Division in New York (R. 274-6). His duties were to prepare reports and recommendations in prosecution and non-prosecution cases in conformity with Bureau policy and the evidence and to hold conferences in the settlement of those cases (R. 276).

The petitioner Bolich was then Special Agent in charge of the Fraud Bureau employing about 150 agents at that time (R. 283). It was his duty as a public officer to receive taxpayers or their attorneys and to refer them to the conferee in charge of any particular investigation. In the latter part of July, 1948, Davis arranged an appointment

to call on Bolich at his office in connection with the Gotham Beef case (R. 316). Davis claimed that he had difficulty in getting Bolich on the telephone, as he was either in conference or busy with Treasury Department officials from Washington (R. 316). Halperin then told him according to Davis' story, that he (Halperin) had spoken to Grunewald, and Grunewald told Halperin that Davis was to continue his efforts to seek an appointment with Bolich (R. 316). Davis called Bolich again and an appointment was made for the following day (R. 316-7).

Thereafter Davis conferred with Bolich at his office, represented himself as the attorney for the Gotham Beef Company and outlined the claims of the Gotham case to him (R. 317). Davis asserted that all of the alleged income from unreported sales of his clients was overceiling money paid out in turn on overceiling costs so that the taxpayers had not profited (R. 317). Bolich thereupon advised him to "submit everything to (the conferee) Mr. Kuehl" (R. 317-8).

Bolich also telephoned Kuehl that Davis was in his office concerning the Gotham Beef case, contending that overceiling purchases and overceiling sales washed out each other and that Davis had checks and invoices to support his clients' claim that there was no tax evasion (R. 276-7).

Kuehl thereafter arranged a conference with Davis for August 16, 1948, which was attended before him by Davis, Special Agent Mullenbach, Louis Berman, one of the members of the Gotham Beef Company and their accountant, Tobias (R. 280).

Kuehl gave the details of the conference and requested Davis' co-operation in submitting net worth statements relating to Philip Berman—one of the principals, as Kuehl had already received such statements with respect to Louis Berman (R. 280-1). After that conference was concluded, Kuehl instructed Special Agent Mullenbach to work with

Tobias (Gotham's accountant) and Davis in order to substantiate their claims or disprove them, and to submit a supplemental report (R. 281).

Subsequently, Mullenbach recommended criminal prosecution in his supplemental report, which Kuehl reversed after conferring with his immediate superior, Mr. Baradel, head of the Conference and Review Section at the Special Agent's office (R. 281-2, 464). Both Kuehl and Baradel agreed that it was "a very weak case" (R. 281-2). Mullenbach conceded that Kuehl and Baradel were more experienced than he and that the only difference that existed between them was whether or not the case was weak (R. 296). He acknowledged that the conference held in August, 1948, and the reinvestigation based on additional evidence were perfectly proper (R. 297-8).

Petitioner Bolich then was no longer Special Agent in charge at the New York office, having left to take up his duties in Washington (R. 284-5, 296).

Kuehl notified Davis on October 28, 1948, that the Gotham Beef case would be closed for civil settlement, with no criminal prosecution, but with the imposition of a civil fraud penalty (R. 282).

Kuehl declared that petitioner Bolich did not at any time request him to do anything improper in the case and that Kuehl's decision was based on his own best judgment uninfluenced by anybody (R. 284). His decision was confirmed by Mr. Baradel, an official of long experience in the Internal Revenue Bureau (R. 284, 464).

The purpose of the alleged conspiracy as testified to by Mr. Tobias—the accountant for the Gotham Beef Company, who was promised immunity from prosecution by the government (R. 163-4)—was stated as follows:

> "Now, the exact terms of the escrow • • • was • • • that until I were to have heard with my own ears

from the special agents' office from a responsible official that there was to be no criminal prosecution in the Gotham matter, * * * the money was not to be released." (R. 165-6)

Pattullo Modes Case

Davis testified that he first consulted a lawyer, Mr. Schwaeber, in September or October, 1947, and later retained the law firm of Saver & Schwaeber as counsel to represent Pattullo Modes, Inc., before the Special Agents' Office of the Internal Revenue Bureau, of which the petitioner Bolich was then the Agent in Charge in New York (R. 305-6). That firm was retained officially on March 31, 1948 (R. 26). Mr. Saver was a former Assistant United States Attorney General and an Assistant United States Attorney in Brooklyn, who had prosecuted tax fraud cases for the Government (R. 213, 470). Unbeknown to these lawyers, Davis contrived a scheme of making a false claim of a voluntary disclosure in which he was aided and abetted by Maurice Smith, the accountant for Pattullo Modes (R. 307-308). The claim was presented and rejected at the Revenue office which handled civil collections and the matter was sent to the Special Agents' office, which was authorized to recommend for or against criminal prosecution (R. 308-309).

Davis went on to say that Mr. Saver told him in March, 1948, that he had discussed the matter of a voluntary disclosure with Mr. Bolich, who replied that he did not believe a voluntary disclosure had been made (R. 308-309). Bolich continued as Agent in Charge of the Fraud Bureau until September 1, 1948, when he went to Washington as Assistant Commissioner of Internal Revenue (R. 275, 464, 513-4).

Davis further testified that Halperin told him to tell Mr. Saver to see Mr. Bolich in Washington (R. 329). Mr. Saver went to Washington and reported back to Davis in November, 1948, that Mr. Bolich said to him:

> "* * * if the taxpayers cooperated fully and developed all of their income that he would recommend that the case be given a non-prosecution consideration (R. 329)."

Mr. Baradel, head of the Conference and Review Section at the Special Agent's office in New York testified that on January 5, 1949, Bolich who was then Assistant Commissioner of Internal Revenue telephoned him regarding the Pattullo Modes case. Baradel advised him that he had ruled against the taxpayers on their claim of voluntary disclosure a couple of months previously (R. 464-5). Bolich agreed that although his (Baradel's) decision was technically correct, he had decided after a conference with the attorneys representing Pattullo Modes (Mr. Saver and Mr. Quinn)* that if the taxpayers gave full co-operation to the agents, the case ought to be closed on a non-prosecution basis (R. 465). Bolich told Baradel he was taking full responsibility for this action and said "let the record show it" (R. 474).

Baradel thereupon advised Clayton, a special agent who had been assigned to investigate the matter (R. 465), of his discussion with Mr. Bolich, told him he could make any kind of recommendation he wished but that he, Baradel, would reverse any recommendation for prosecution in view of this assurance given to the taxpayers by higher authority (R. 478-9).

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* Mr. Quinn became a member of the law firm of Saver & Schwaeber. Mr. Quinn was a former Assistant United States Attorney in Brooklyn, a member of Congress and at the time of the trial was District Attorney of Queens County, New York (R. 471).

Baradel stated that the matter was not to be deemed closed until Squad Leader Dowling returned to the office and the three of them (Baradel, Clayton and Dowling) could then discuss what recommendation would be proper (R. 478-9).

Clayton called Mr. Saver after he had been told that the taxpayers in the Pattullo case were going to co-operate (R. 446). Clayton asked for all of the corporate records, basic records, supporting records, checks, invoices, sales stubs and all of the records relating to the personal finances of the individuals of any kind whatsoever, including the members of their families (R. 446). The prime importance of procuring net worth statements is set forth in detail in the Record at pages 460-462. Clayton was not so much concerned with the corporate records as he was with the individual records of the taxpayers (R. 452).

Instead of the government spending months circularizing customers, banks and brokers, co-operation from the taxpayers supplying information about their personal wealth and their personal dealings with corporate cash, furnished indisputable evidence against them and saved the government a great deal in investigation (R. 452).

On November 19, 1948, Clayton went to the Pattullo office, where Davis informed him that his clients wanted to co-operate fully and would submit net worth statements (R. 453-4).

On January 4, 1949, the taxpayers appeared at the Special Agents' office. Clayton wrote out their statements which they signed under oath (R. 454-5, 462). When they made complete signed confessions, he felt that they had at least reached a degree of co-operation (R. 454-5).

Instead of $100,000 undisclosed income, the figure was increased to a sum in excess of $387,500 resulting from information supplied to the government by the taxpayers or their representatives (R. 458).

At the meeting in Baradel's office on January 10, 1949, Mr. Saver called attention to Bolich's promise and after Baradel learned that full co-operation has been given by the taxpayers, he announced that he would close the case against them without prosecution, but with a 50 per cent penalty (R. 331, 467).

Baradel further declared that he had determined definitely against prosecution and had reached that decision honestly in the exercise of his best judgment and discretion (R. 480-1, 485-7).

The purpose of the alleged conspiracy in the *Pattullo* case was thus stated by Mr. Marks, one of the principals connected with that concern, who was named as co-conspirator, but not indicted (R. 4):

> "He [Davis] says all he could promise us that there would be a memorandum put into our file that the case was to be settled on a civil basis" (R. 32).

The Termination of the Alleged Conspiracies in the Pattullo and Gotham Beef Cases

It is clear from the foregoing outline of the facts that the object and purposes of the alleged conspiracy ended in the *Pattullo* case in January, 1949, when the official announcement was made by Special Agent Baradel in the New York Fraud Bureau that the case against the Pattullo principals would be closed against them without criminal prosecution, but with the imposition of a 50 per cent civil penalty (R. 32, 33, 74, 226-230, 331, 332-3, 467).

In the *Gotham Beef* case, the alleged conspiracy also terminated when its objects were fully achieved in October, 1948, upon the official ruling made by Mr. Kuehl in the Special Agent's Office that the case would be closed for civil settlement, with no criminal prosecution, but with the imposition of a civil fraud penalty (R. 147, 148, 153-4, 165-6, 185, 325-6, 282).

The indictment herein was filed October 25, 1954 (R. 4). The Statute of Limitations was, therefore, a complete defense to the prosecution under U.S.C. § 371 and an insuperable obstacle in the government's way, because the three-year period under the general conspiracy statute barred any prosecution. To save the case from the bar of the statute, the prosecution ingeniously charged a general and continuing conspiracy including a conspiracy to conceal and to subvert witnesses before a Congressional Investigating Committee (in 1951) and before a Grand Jury (in 1952) (R. 4-9).

The Government's Concession Upon the Trial

During the argument on the motions for judgment of acquittal made on behalf of all defendants, the Government conceded that no overt acts other than concealment had occurred within the three year limitation period (R. 565).

In connection with the alleged continuing conspiracy to conceal and its effect on the Statute of Limitations, the trial Court stressed the point that this was an important element of the first count of the indictment, inasmuch as the Statute of Limitations on the charge of criminal conspiracy is three years and

> "• • • unless the conspiracy was continuing to a period within three years prior to the date of the indictment, October 25, 1954, and some overt act was performed within that three year period, the crime, if any, alleged in the first count of the indictment would be outlawed. It is the contention of the government that the conspiracy did not end when the taxpayers were advised that there would be no criminal prosecution recommended by the Special Agent's office, but that an integral part of the entire conspiracy was an agreement to conceal the acts of the conspirators and that when thereafter an investigation was started by Con-

gress and by the Grand Jury in the Eastern District of New York, the conspirators performed overt acts in pursuance of the original conspiracy designed to conceal the true facts; and that these acts occurred within three years prior to the date of the indictment * * *" (R. 732).

The Overt Act Charged Against Bolich Occurring After October, 1951—Within the Period of the Statute of Limitations

Insofar as petitioner Bolich is concerned, the sole overt act with which he is charged in the indictment, related to a telephone conversation had on or about December 20, 1951, with one Everett Harding (R. 9).

Harding, Assistant Manager of the Hotel Washington, Washington, D. C. testified, among other matters, that in the summer of 1950, Bolich requested his hotel bills for approximately a year back so that he might review them (R. 949). About a month or two later, Harding handed a compiled record of bills to Bolich, which did not include voucher records such as long distance telephones and restaurant charges (R. 950). Harding claimed that the records were never returned to him (R. 950). In December, 1951, when the King Committee of the House of Representatives subpoenaed these records, the hotel management requested Bolich to return them (R. 950-2). On December 20, 1951, Bolich telephoned Harding and we quote from the record:

"Q. What did he say? A. The substance of the call was that Mr. Bolich said he had not received the records—let us see now, it has been so long ago, sir, I am sorry, I will do my best—he had not received the records, that he had been in bed with a bad heart * * *" (R. 952).

Harding had no clear recollection of this conversation and sought to refresh his memory by the use of a memorandum (R. 952-3). He then modified his testimony as follows:

> "Mr. Bolich said he did not receive the records and later in his conversation said he simply did not remember ever having received them; that if he had, he knew he had not taken them from the office or away from the office; that it could have been that he might have laid them on Mr. Rhodes' desk [Executive Assistant Manager of the hotel] or something of the sort there, that he knew he had never taken them away from the office" (R. 953).

Bolich told him there must be other records and if the hotel had its voucher records, they could reconstruct their bills from that (R. 954).

On cross-examination, Harding stated that all voucher records were destroyed by the hotel every two years, and larger bills were kept five years (R. 796). These records were discarded in the usual course of business and was not done at Bolich's request (R. 795).

Mr. Harding at first testified that he did not know whether or not Bolich was a resident of the Washington Hotel from June 22, 1949 to June 22, 1950 and could not tell unless he had the records to show such occupancy (R. 948). When Mr. Harding resumed his direct testimony the next day, he declared on the question of Bolich's occupancy in flat contradiction of his previous testimony as follows:

> "Q. Mr. Harding, when court adjourned last night you had just testified that you had handed Daniel Bolich hotel records for his occupancy of your hotel from June of 1949 to June of 1950 and that when you had received the subpoena from the King Committee

for these records you had requested them of him? A. That is right.

Q. Now, limiting yourself to that period from June 1949 to June 1950, do you know whether Mr. Bolich resided in your hotel during that time? A. Yes, he did.

Q. Where in the hotel did he reside during that period? A. Partly in Suite 319, 320 and 321, and then changed some time during that period to 419, 420 and 421" (R. 954-955).

In the government's brief in opposition to the petition for certiorari herein it is stated at page 15 that:

"It was during the period covered by the missing records that Bolich was living in the Grunewald suite which was carried in the name of Harry Woodring" (G. 172).

Mr. Harding produced the registration card in the name of Harry Woodring for Suite 319, 320 and 321, which was rented to him on a permanent guest basis (R. 499; Certified Record of proceedings below, pp. 3225-6). Mr. Woodring was formerly Secretary of War under President Roosevelt (R. 508). The witness produced hotel bills in the name of Mr. and Mrs. D. A. Bolich for the same suite (R. 500). Grunewald also used part of the suite which he maintained as an office (R. 527-8). Grunewald lived, however, at the Westchester Apartments in the suburbs of Washington (R. 546).

The trial record is clear that Bolich's occupancy at the hotel was known and recorded at all times and was never concealed (Government's Exhibit 62; Certified Record of proceedings below, pp. 3159-3160). It is apparent from this exhibit that the so-called "missing records" consisted of bills rendered to Bolich from June, 1949 to June, 1950, for hotel service and incidentals such as valet services,

laundry and similar items, but did not include such voucher records as long-distance telephones and restaurant charges (R. 949-950).

The Variance Between the Indictment and the Proof of Multiple Conspiracies

Although the indictment charged a single conspiracy, the proof established a series of separate and disconnected conspiracies.

There was no evidence that petitioner Bolich was a party to the Davis and Smith conspiracy (R. 307-308), which related to Smith's perjured affidavit of voluntary disclosure presented by him while acting as the accountant for Pattullo Modes.

There was no evidence connecting Bolich with the charge alleged in Paragraph 9 of Count 1 of the indictment (R. 7) that the defendants Steinberg and Scherm would use their positions as employees of the Internal Revenue Bureau to impress various persons with the connections and ability of the law firm of Schopick & Davis to procure favorable disposition of tax matters within the Bureau regardless of merits. Defendants Steinberg and Scherm were acquitted on all counts (R. 764-5). Because Steinberg and Scherm were named as defendants, the prosecution presented evidence—in no manner connected with Bolich—relating to Hoffman's contacts and alleged conversations with Steinberg (R. 206-207; 208-211; 233-236; 240-246) and of alleged negotiations of Davis with Scherm for a $50,000 payment to Scherm (R. 334-338).

Scherm testified in his own defense that he never even spoke to Bolich (R. 599). Evidence which completely failed to connect Bolich therewith was also received as to Hoffman's maneuvers to obtain the Pattullo Modes as a client for Schopick & Davis (R. 206-7; 210-211).

There was no evidence that Bolich was in any way involved with the extortionate demands of Hoffman and Davis upon the Pattullo principals to procure their tax case (R. 23).

Bolich was not in any way connected with the alleged arrangement of Davis and Schwaeber and the Pattullo principals to pay an unrecorded cash fee to Schwaeber (R. 334-4).

Bolich was not in any manner connected with any of the substantive acts alleged in the fifth, sixth and seventh counts which charged that all of the eight defendants did unlawfully endeavor in the month of March, 1952, to influence certain named witnesses to give false testimony and to obstruct justice concerning certain income tax fraud investigations being conducted by the Brooklyn Grand Jury (R. 14-16). Indeed, Bolich, Grunewald, Steinberg and Scherm were acquitted of these substantive charges by direction of the trial Court at the close of the government's case (R. 569).

Defense Motions

At the end of the government's case, the petitioners separately moved for judgment of acquittal on various grounds, particularly contending that the charge of conspiracy to conceal, coupled with the fact that overt acts were alleged to have taken place in 1951 and 1952, constituted an ingenious device to extend the Statute of Limitations which was a bar to the prosecution of the conspiracy charges (R. 546-565). The motions were argued at great length by respective counsel and included motions to strike out extraneous matter as against the petitioners (R. 546-7, 551-4, 799-801), or to dismiss for variance (R. 548-549) or to separate the issues (R. 557-559). The motions directed to counts 1 and 2 of the indictment were denied (R. 569). All other motions to strike out testimony were denied (R. 569).

The motions were renewed at the close of the entire case (R. 710-712, 799-801). Upon denial of the motions, exceptions were taken which inured to the benefit of all defendants (R. 711). Substantially the same grounds were again advanced in support of motions made by respective counsel to set aside the verdict and for a new trial (R. 765-6, 778-780, 807-809).

The Court below in its original decision unanimously affirmed the judgments of conviction as to the petitioner Bolich and co-defendant Grunewald. Judge Frank dissented solely as to the defendant Halperin and voted to grant him a new trial on the ground of the invasion of his constitutional rights, coupled with the trial Court's instruction that the jury might consider his assertion of his constitutional privilege as affecting his credibility. On petitions for rehearing, Judge Frank dissented as to all defendants and voted to grant them a new trial because of a serious error in the trial judge's charge on the issue of the Statute of Limitations (Vol. V App. Majority Opinion, pp. 288a-316a; Original Dissenting Opinion, pp. 316a-357a; Dissenting Opinion on Denial of Petitions for Rehearing, pp. 380a-393a).

Summary of Argument

The issues involved in this case relate to the three year Statute of Limitations applicable to the general conspiracy count; to the doctrine of multiple conspiracies; and the propriety of the trial Court's ruling and instruction to the jury that they might consider petitioner Halperin's claim of constitutional privilege before a Grand Jury as adversely affecting his credibility upon the trial when he gave evidence as the only witness for the defense.

(1) All parties agree that the three-year Statute of Limitations is applicable. The indictment herein was re-

turned on October 25, 1954. The crucial date, therefore, is October 25, 1951. The theory of the prosecution was that the alleged conspiracy involved the corrupt and unlawful disposition of two separate tax cases, namely *Pattullo Modes, Inc.* and *Gotham Beef Co.*, which were under investigation in 1948 by the Internal Revenue Department. The purpose or object of the conspiracy as testified to by the government's witnesses was to obtain rulings from government officials that their tax cases would be closed without criminal prosecution against them.

The objective of the alleged conspiracy was achieved when, in January, 1949, the desired ruling was made in the *Pattullo* case. The *Gotham* case was closed previously in October, 1948, when an official announcement was made that there would be no criminal prosecution.

The indictment charged as part of the conspiracy allegedly starting in 1946, a continuing agreement to conceal the acts done pursuant thereto and to influence witnesses in 1952 before a Brooklyn Grand Jury and also a Congressional Committee apparently in 1951. There was no conceivable basis for accusing the defendants with such a conspiracy claimed to have been formed in 1946, as no one could have known at the time of the formation thereof that there would be a Congressional investigation in 1951 and a Grand Jury inquiry in 1952.

Except for the concealment feature, prosecution would have been barred by the defense of the Statute of Limitations.

The Government conceded upon the trial that the only overt acts alleged and proved to have been committed within the three-year period preceding the filing of the indictment were acts of concealment.

It is contended that the acts of concealment were individual and independent acts of one or more of the conspirators to cover up their tracks to avoid detection and

punishment. It is further contended that attempts to cover up their wrong doing after the accomplishment of the conspiracy cannot be overt acts done to effect the object of the conspiracy. The record is barren of any proof that these acts were part of the main conspiracy to defraud the government and petitioners contend that an agreement to conceal never was an objective or part of the main conspiracy.

The decision of the Court below is squarely in conflict with the principles laid down in *Krulewitch* v. *United States*, 336 U. S. 440, and *Lutwak* v. *United States*, 344 U. S. 604, which preclude implying an extension of the conspiracy, because a contrary rule would result in an indeterminate extension of the Statute of Limitations.

(2) More than one conspiracy was proved in violation of the principles in *Kotteakos* v. *United States*, 328 U. S. 750, because each defendant in this case had a substantial right not to be tried *en masse* for a conglomeration of distinct and separate offenses committed by others.

(3) The petitioner Halperin presents in his summary and argument the question involved relating to Halperin's claim of constitutional privilege and the trial judge's prejudicial instruction to the jury affecting not only Halperin—who testified for the defense—but also the petitioners Bolich and Grunewald.

Argument

POINT I

(Question Presented No. 1.)*

The three year Statute of Limitations applicable to the charge of conspiracy, barred conviction of the petitioner Bolich inasmuch as the objective of the alleged conspiracy had been achieved by January, 1949—more than five years before the date of the indictment which was filed on October 25, 1954.

Statutes of limitations in criminal cases differ from those in civil cases, in that in civil cases they are statutes of repose, while in criminal cases, they create a bar to the prosecution (15 Am. Jur., *Criminal Law*, §342, p. 32; 1 Wharton, *Crim. Proc.*, 10th ed., § 367, p. 415).

Statutes limiting the time for instituting criminal prosecutions should be liberally construed in favor of the defendant, and exceptions from their benefits are to be construed strictly against the prosecution (1 Wharton, *Cr. Law*, 7th ed., § 444a). Such liberality of construction belongs to all acts of amnesty and grace, because the very existence of the Statute is a recognition and notification by the very Legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt (*Moore* v. *State*, 43 N.J.L. 203; *People* v. *Buckner*, 281 Ill. 340).

* In the *Grunewald* petition for certiorari (No. 183), Question Nos. 1, 2, 3, 4, and in the *Halperin* petition (No. 184), Question Nos. 8, 9, represent different aspects of the same point. The argument on this question is dealt with so comprehensively by counsel for the petitioner Grunewald, that we respectfully urge that it be considered with the same force and effect as if restated here, since it is equally applicable to the petitioner Bolich.

In the majority opinion below, it is stated on the issue of the Statute of Limitations, in part, as follows:

> "Each of the appellants argues that, even if a conspiracy is proved, prosecution is barred by the Statute of Limitations. This is an interesting and important question, seemingly one of first impression. As all parties agree that the three-year period prescribed by 18 U.S.C. § 3282 is applicable, the crucial date is October 25, 1951. Bolich, Grunewald and Halperin earnestly press their view that the Statute of Limitations began to run no later than January 10, 1949, when the official ruling was made that there would be no criminal prosecution in the Pattullo Modes case. * * *" (Vol. V App. 299a).

The scope of an alleged criminal conspiracy must be gathered from the testimony and not from the averments of the indictment (*Terry* v. *United States* (C.C.A. 9) 7 F. 2d 28, 29; *Ford* v. *United States* (C.C.A. 9) 10 F. 2d 339, 348, affirmed 273 U. S. 593; *Marino* v. *United States* (C.C.A. 9) 91 F. 2d 691, 699).

The government's pattern of proof so far as petitioner Bolich is concerned related to two separate tax cases, namely *Pattullo Modes, Inc.* and *Gotham Beef Company.*

In spite of the immense mass of accusations and hearsay testimony stemming primarily from self-confessed accomplices and co-conspirators who were promised immunity from prosecution—all of which was thrown confusedly before the jury in a trial of seven weeks' duration—a scrutiny of the record demonstrates that the conspiracy if any existed, had ended upon the accomplishment of the object thereof, more than three years before the return of the indictment.

We have already set forth the specific evidence in the record as to the purpose or object of the alleged con-

spiracy as testified to by the taxpayers themselves in the *Pattullo* and *Gotham Beef* cases (see, *supra*, 10-11, 14). The official ruling that there would be no criminal prosecution in the *Pattullo* case was made January 10, 1949 (R. 37, 331-3). In the *Gotham Beef* case, the official announcement that the case would be closed without criminal prosecution was made in October, 1948 (R. 147, 148, 153-4, 165-6, 185, 282, 325-6).

The money was allegedly released by the taxpayers in the *Pattullo* case on or about January 12 or 13, 1949 (R. 331-3), and in the *Gotham* case in October, 1948 (R. 167, 169).

In the light of the chronology of events disclosed by the record, it is clear that the indictment returned on October 25, 1954, charging an agreement to conceal as part of the original conspiracy, is an adroit, camouflaged composition designed to extend the Statute of Limitations which had run in January, 1952, three years after January 10, 1949 when the objective of the conspiracy had been attained.

In the first place, there was no evidence whatever to sustain the charge in the indictment that as part of the alleged conspiracy starting in 1946, there was also an agreement to influence witnesses in 1952 before the Grand Jury in the Eastern District of New York (R. 149-50, 170-2) and before a Congressional Investigating Committee apparently in 1951 (R. 38-9, 149, 170, 354-5). Such charge is beyond the bounds of reason because the petitioners could not possibly have known at the time of the alleged conspiracy that there would be such Grand Jury and Congressional investigations three to three and one-half years later.

The case at bar cannot be distinguished in any essential respect from that of *Krulewitch* v. *United States*, 336 U. S. 440 and *Lutwak* v. *United States*, 344 U. S. 604. All

the petitioners maintain that the decision of the Court below is in clear conflict with the *Krulewitch* and *Lutwak* cases, which support the contentions of the petitioners. This question is elaborately and exhaustively considered in the briefs of petitioners Grunewald and Halperin. It would serve no useful purpose to repeat the same arguments therein contained, which we adopt in all respects and incorporate by reference herein. We do, however, desire to add what was said by Mr. Justice Jackson, in his concurring opinion in the *Krulewitch* case, 336 U. S. 440, 445-6, as singularly appropriate here:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' * * * The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, * * * suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

POINT II

(Question Presented No. 2.)*

Multiple conspiracies were established by the evidence, rather than a single general conspiracy, to the substantial prejudice of the rights of the petitioner Bolich.

The trial herein was "conducted * * * on the assumption that it was immaterial whether the proof showed

* In the *Halperin* petition for certiorari (No. 184), Question No. 9, involves the same point.

one conspiracy with which all of the defendants were connected, or separate conspiracies with which some, but not all, of them were" (*Brooks* v. *United States,* 164 F. 2d 142, 143 (C.C.A. 5).

The first count of the indictment alleges a single, all-inclusive conspiracy from 1946 to 1954. The proof, however, does not conform to that charge. In our statement of the case, we set forth at pages 19-20, the particulars which demonstrate that the proof established a series of separate and disconnected conspiracies, which affected the substantial rights of the petitioner.

Upon the trial, petitioner Bolich joined in the motions seeking a dismissal of the first count upon the ground of a fatal variance between the pleadings and the proof (R. 548-9).

The case at bar clearly falls within the principle of *Kotteakos* v. *United States,* 328 U. S. 750, where the indictment alleged a single conspiracy and the evidence proved multiple conspiracies by separate groups of defendants which had no connection with each other except that all utilized one Brown as a broker to handle fraudulent applications for loans under the National Housing Act. The judgments were reversed because the trial Court's instructions confused the common purpose of a single enterprise with the purposes of numerous separate conspiracies; permitted the dangers of transference of guilt by the jury from one to another across the line separating conspiracies particularly in view of the Court's charge that the statement and overt acts of *any* defendant found to be a conspirator could be considered against *all* defendants. This Court held that each defendant had a "substantial right" not to be tried *en masse* for a conglomeration of distinct and separate offenses committed by others.

There was not the slightest justification in respect to petitioner, Bolich for adding a charge that he conspired

to influence certain named witnesses in March 1952. The Court directed a judgment of acquittal at the close of the governments' case on the substantive counts alleged in the fifth, sixth and seventh counts charging such offenses against him and likewise directed the acquittal of the petitioner Grunewald (R. 569).

We have marshaled the mass of unrelated and highly prejudicial evidence at pages 19-20 of this brief by which the prosecution sought "* * * to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all-comprehensive indictments that they can be avoided." *United States* v. *Falcone*, 109 F. 2d 579-581 (C.C.A. 2).

This case points up vividly the evils of the single count conspiracy indictment discussed by Mr. Justice Jackson in his concurring opinion in *Krulewitch* v. *United States*, *supra*, 306 U. S. 440, 445-6.*

In *United States* v. *Siebricht*, 59 F. 2d 976 (C.C.A. 2), the indictment charged a single conspiracy, but the proof indicated two separate conspiracies. Even assuming that the indictment could be read as setting forth two conspiracies which might be properly joined, the question of

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* The Court below in its majority opinion (Vol. V, App. 303a) stated:

> "The record contains ample proof of efforts by the conspirators to forestall suspicion and wipe out traces of their operations and these efforts developed later and in 1951 and 1952 into an intensified campaign of concealment, the details of which will be referred to briefly in connection with the charges against Halperin in Counts 5, 6 and 7."

There is not a particle of evidence which in any way links petitioners Bolich and Grunewald with the charges in Counts 5, 6 and 7, on which they were acquitted by direction of the trial court (R. 569).

guilt in respect to the first conspiracy could not be submitted because that cause of action was barred by the Statute of Limitations. The trial Judge submitted the case only upon the theory that the jury could convict if it found a single conspiracy, and charged that to find the defendant guilty with respect to the second transaction it must find a continuing conspiracy throughout.

Judge Augustus N. Hand, writing for the Court, in reversing the judgment of conviction, held that proof of two conspiracies, one of which was barred by the Statute of Limitations constituted a fatal variance with the indictment alleging a single conspiracy. (See also Judge Frank's dissenting opinion in the case at bar on the same subject (Vol. V App. 388a-389a).)

POINT III

(Question Presented No. 6.)*

The trial Court committed prejudicial error in permitting the government to elicit from the defendant Halperin upon his cross examination that he had invoked the Fifth Amendment at a Grand Jury hearing and the trial Court charged the jury that they might consider Halperin's claim of constitutional privilege as adversely affecting his credibility.

We join with the petitioner Grunewald in relying upon the brief filed on behalf of petitioner Halperin on this subject.

The invasion of the petitioner Halperin's constitutional rights, coupled with the trial judge's ruling and instruc-

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* In the *Grunewald* petition, the same question is substantially involved in No. 6. In the *Halperin* petition, various aspects of the question are involved in Nos. 1, 2, 3, 4, 5, 6 and separate phases of the question are involved in Nos. 7, 11.

tion that the jury might consider his assertion of his constitutional privilege as affecting the credibility of his other testimony at the trial, necessarily affected and prejudiced the rights of petitioner Bolich as well as Grunewald, because Halperin was the only witness for this group of defendants and testified to vital and material facts which supported not only his claim of innocence, but the innocence of the petitioners Bolich and Grunewald (R. 684-687, 690-693, 701-703, 748, 756-758).

If Judge Frank is right in his original dissenting opinion (Vol. V App. 316a-357a), in which he has given this constitutional question so exhaustive an examination, then the conclusion is inescapable that the challenged ruling and instruction were erroneous and rendered impossible a fair and objective consideration of the evidence against petitioner Bolich by the jury. The jury's verdict could readily have been influenced by this serious error. The record shows that all counsel vigorously and persistently protested the trial judge's ruling and instruction on this subject and moved for a mistrial (R. 684-687, 690-693, 701-703, 748, 756-758).

We submit that it is highly probable that the challenged ruling and instruction relating to the credibility of Halperin may have turned the wavering scales not only against him but the petitioners Bolich and Grunewald as well. We base this statement on Judge Frank's observation in the course of his first dissenting opinion (Vol. V, App. 329a), that: "The evidence against Halperin is not overwhelming. The jury could reasonably have acquitted him." This applies with equal force to the petitioner Bolich, for the jury might well have come to a different conclusion if the Court had not charged that Halperin's claim of constitutional privilege—the only witness for the defense—might discredit his trial testimony.

CONCLUSION

The judgment should be reversed and the indictment dismissed, or in the alternative, a new trial granted.

Respectfully submitted,

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